

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF TEMPORARY CHANGE)

MEMORANDUM DECISION

APPLICATION NUMBER t90-55-16)

Temporary Change Application Number t90-55-16, was filed by Caleb Limited Partnership on March 2, 1990, to change the point of diversion, place and nature of use of 0.55 cfs of water, not to exceed 150 acre-feet, as evidenced by a portion of Application Number 55-77 (A4306a, Certificate Number 1310). Heretofore, the water was diverted from the tailrace of the Olmsted Power Plant at a point South 2117 feet and East 373 feet from the NW Corner of Section 7, T6S, R3E, SLB&M. The water was used for the irrigation of 37.5 acres of land.

Hereafter, it is proposed to divert the 0.55 cfs, not to exceed 150 acre-feet, of water from 12 springs and the stream in the North Fork of Provo Canyon. These points of diversion are located in Sections 10 and 15, T5S, R3E, SLB&M. They will be used for various purposes in the operation of Sundance Resort.

The Temporary Change Application was advertised in The Daily Herald on March 15, 1990. Protests were received from Provo River Water Users' Association and U.S. Bureau of Reclamation. The former asserts that the temporary change application is based on a water right which is predicated upon the availability of water from the Olmsted Power Plant tailrace in excess of the quantity that can be diverted into the Provo Bench Canal under the Blue Cliff right for use by the Provo Reservoir Water Users Company. After the Olmsted Plant ceased operation in 1986, the Company can divert its Blue Cliff right upstream at the Murdock Dam; hence, there is no excess water available at the tailrace to satisfy the underlying right of the temporary change application. This would impair the rights of Provo River Water Users' Association. The latter protestant simply alleges that the subject water right is no longer valid.

A hearing was held on April 12, 1990, at Salt Lake City, Utah. Legal counsel for the applicant stated that the applicant had filed temporary changes on Certificate Number 1310 since 1976, and the State Engineer had approved all of them. The water right has been the subject of litigation several times and three of the cases went to the Utah Supreme Court where the validity of the water right was upheld. Also, the water right has been exercised continuously. The applicant then submitted a study performed by the Provo River Commissioner which shows that excess water has been available in most years for the diversion under Certificate Number 1310.

Representatives for the protestants reiterated the written portests. They acknowledged that the applicant's water right is valid but it has a very low priority; however, it is senior to the water rights of the U.S. Bureau of Reclamation for storage of Provo River water in Deer Creek Reservoir under the Provo River Project. Now that the Provo Reservoir Water Users Company can fully satisfy its Blue Cliff right by diverting at the Murdock Dam, allowing diversion of water (under the change application) in the North Fork of Provo

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Canyon would put a new demand for water on the Provo River system and diminish the quantity of water which the Provo River Water Users' Association could store in Deer Creek Reservoir.

The State Engineer has reviewed the subject water right and the submitted study by the Provo River Commissioner. He has noted the following:

- a. Water Right Number 55-77 (A4306a, Certificate Number 1310) has a priority date of October 11, 1911, and Certificate Number 1310 was issued on September 13, 1924. Furthermore, Court decisions on file attest to the validity of the right.
- b. The study done by the Provo River Commissioner for the years 1947 to 1975 shows that, on the average, there were 55.7 days per year when there was an available flow of 5.0 cfs for diversion under Certificate Number 1310. A flow of 5.0 cfs for 55.7 days delivers 551 acre-feet of water.

In view of the above, the State Engineer believes that if there was an average of 551 acre-feet of water available to divert at a rate of 5.0 cfs under Certificate Number 1310 over a 29-year period in the past, the same average quantity should be available in the future regardless of any change in point of diversion by the Provo Reservoir Water Users Company. Section 73-1-3, Utah Code Annotated, 1953, states: "Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state." It is the opinion of the State Engineer that the historical diversions by the Provo Reservoir Water Users Company represents its beneficial use under its portion of the Blue Cliff right. Increasing its diversion at the Murdock Dam is an enlargement of the right, which is contrary to Utah law, and would impair other water rights on the Provo River including that of the applicant and those for storage under the Deer Creek Project.

Thus, it is the opinion of the State Engineer that there are many times when there are excess flows in the Provo River which can be diverted under Certificate Number 1310. Whether or not there will be any excess flows available during the 1990 irrigation season, the State Engineer does not know at this time, but if excess flows are available, the applicant should be allowed to divert water under the temporary change application.

It is, therefore, ORDERED and Temporary Change Application Number t90-55-16 is hereby APPROVED subject to all prior rights and the following conditions:

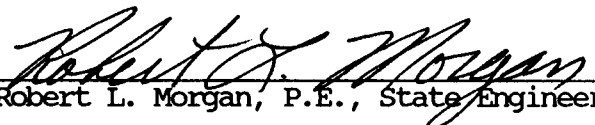
1. Water shall be diverted under the temporary change application only when it has been determined by the State Engineer and the Provo River Commissioner that there are excess flows in the Provo River which can be diverted under Certificate Number 1310.

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2. Should the Olmsted Power Plant resume operation and there are excess flows in the Provo River available for diversion under Certificate Number 1310, the applicant shall arrange with the power producer to pay any required compensation for loss of power generation.
3. The total quantity of water diverted under the change application shall be reported by the Provo River Commissioner in his annual report to the State Engineer.
4. Any addition costs incurred by the Provo River Commissioner in the administration of the temporary change application shall be borne by the applicant. The amount of such costs shall be determined by the River Commissioner and/or the State Engineer.

This Decision is subject to the provisions of Rule R625-6-17 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code Annotated, 1953, which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this Decision. However, a Request for Reconsideration is not a prerequisite to filing a court appeal. A court appeal must be filed within 30 days after the date of this Decision, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

Dated this 11th day of May, 1990.


Robert L. Morgan, P.E., State Engineer

RLM:JER:ap

Mailed a copy of the foregoing Memorandum Decision this 11th day of May, 1990, to:

Caleb Limited Partnership
310 South 100 East #3
St. George, UT 84770

U.S. Bureau of Reclamation
c/o P. Kirt Carpenter
P.O. Box 51338
Provo, UT 84605

Provo Water Users' Association
750 North 200 West #201-B
Provo, UT 84601

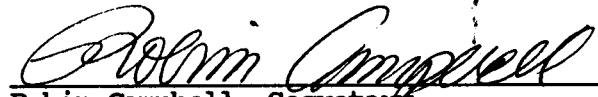
Snow, Christensen, and Martineau
c/o Marc T. Wangsgard
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Lawson and Ida Hamblin
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St. George, UT 84770

Provo River Commissioner
Stanley H. Roberts, Jr.
1675 South 350 East
Orem, UT 84058

By:


Robin Campbell, Secretary